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IN THE  
**Supreme Court of the United States**

October Term, 1939.

No. **17**

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID  
W. COMPTON, et al.,

*Petitioners,*

*v.*

INDEPENDENCE SHARES CORPORATION, ALFRED  
H. GEARY, FRANK McCOWN, et al.,

*Respondents.*

**Brief of the Respondents in Opposition to  
Petition for Writ of Certiorari.**

✓ **FRANK ROGERS DONAHUE,**  
*Counsel for Respondents.*

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IN THE  
**Supreme Court of the United States.**

—  
No. 733. October Term, 1939.  
—

ROBERT J. DECKERT, ROLAND W. RANDAL, DAVID  
W. COMPTON, ET AL.,  
*Petitioners,*

v.

INDEPENDENCE SHARES CORPORATION, ALFRED  
H. GEARY, FRANK McCOWN, JR., ET AL.

—  
BRIEF FOR THE RESPONDENTS IN OPPOSITION  
TO THE PETITION FOR WRIT OF CERTIORARI.  
—

Reference to the Official Report of the Opinions Delivered  
in the Courts Below.

Deckert et al. v. Independence Shares Corporation et al., 27 F. Supp. 763 (1939); Independence Shares Corporation et al. v. Deckert et al.; Pennsylvania Company for Insurances on Lives and Granting Annuities et al., 108 Fed. 2nd, 51, C. C. A. 3rd Cir. 1939.

**COUNTER-STATEMENT OF THE CASE.**

On March 11, 1939 a Bill in Equity was filed by nine complainants, holders of Capital Savings Plan Contract Certificates issued by Capital Savings Plan, Inc., seeking the appointment of a receiver for Independence Shares Corporation, a Pennsylvania corporation, the successor to Capital Savings Plan, Inc. and attempting to reach certain



trust assets held by The Pennsylvania Company for Insurances of Lives and Granting Annuities, in trust for planholders (R. 36, 37, 38).

The nine complainants, holders of Capital Savings Plan Contract Certificates issued by Capital Savings Plan, Inc., predecessor of Independence Shares Corporation (a Pennsylvania corporation), are nine of approximately eighteen thousand planholders who have paid approximately five million dollars (R. 253, 16). The total amount which these nine complainants have paid in on their plans, less the cash withdrawals, is less than three thousand dollars (R. 477, 343-345). None of these nine complainants appeared or testified in the proceeding (R. Index).

The District Court, after filing its opinion, approved an order amending the caption by adding two additional complainants, J. H. Irvin and J. S. Van Sciver, as parties plaintiff (R. 457).

Capital Savings Plan, Inc., predecessor of Independence Shares Corporation, was created for the purpose of sponsoring and distributing to the public contract certificates which provide for the purchase of Independence Trust Shares either by monthly payments or by a single payment. Pursuant to the terms of the contract certificates, payments are made to The Pennsylvania Company for Insurances on Lives and Granting Annuities as trustee and after certain authorized deductions, the balance is invested in Independence Trust Shares for the account of the planholders (R. 157).

Capital Savings Plan, Inc. entered into contracts with the complainants whereby the complainants became holders of Capital Savings Plan Contract Certificates. Under the terms of these contracts, Capital Savings Plan, Inc. con-

tracted that The Pennsylvania Company for Insurances on Lives and Granting Annuities would act as Trustee for the holder of Capital Savings Plan Contract Certificate and, as such Trustee, The Pennsylvania Company for Insurances on Lives and Granting Annuities would receive payments made by the contract certificate holder, and after authorized deductions, purchase trust shares which would be held in trust by The Pennsylvania Company for Insurances on Lives and Granting Annuities for the Capital Savings Plan Contract certificate holder individually (R. 129, 130, 137, 165, 424, 425).

The complainants based their prayer for the appointment of a receiver of Independence Shares Corporation on alleged misrepresentations made to them by Capital Savings Plan, Inc. in the sale of Capital Savings Plan Contract Certificates (R. 17).

Capital Savings Plan, Inc. entered into a contract with The Pennsylvania Company for Insurances on Lives and Granting Annuities whereby The Pennsylvania Company for Insurances on Lives and Granting Annuities contracted to act as Trustee for holders of Capital Savings Plan Contract Certificates; to receive payments made by such contract certificate holders and after making authorized deductions invest the balance in Independence Trust Shares and to hold the trust shares as individual trust property for each contract certificate holder, subject only to his order (R. 129, 130, 157, 165, 424, 425).

Independence Shares Corporation creates Independence Trust Shares by the deposit with The Pennsylvania Company for Insurances on Lives and Granting Annuities as Trustee of one share of stock of each of a specified list of corporations for which 1000 Independence Trust Shares are issued. The number of corporations was fifty and is now thirty-five (R. 124, 114, 425).

The complainants filed a bill of complaint against Independence Shares Corporation as successor to Capital Savings Plan, Inc. The bill, in addition to the corporate defendants, names as defendants five directors of Independence Shares Corporation, some of whom are officers (R. 7, 10). The relief prayed for was the appointment of a receiver for all corporate defendants other than The Pennsylvania Company for Insurances on Lives and Granting Annuities, and as to the individual defendants no recovery was sought. As to The Pennsylvania Company for Insurances on Lives and Granting Annuities, the bill sought to reach the trust assets held by it for the planholders (R. 36-38).

On June 23, 1938 the Securities and Exchange Commission instituted an equity suit in the United States District Court for the Eastern District of Pennsylvania against Capital Savings Plan, Inc. and Independence Shares Corporation alleging violations of the Securities Act of 1933. On the same day Capital Savings Plan, Inc. and Independence Shares Corporation filed an answer denying the violations, but admitting the jurisdiction of the Court, and that the bill stated a cause of action and consenting to the entry of a final decree. On the same day the Court entered a decree restraining future violations of the Securities Act (R. 30).

On July 12, 1938, the Securities and Exchange Commission allowed a registration statement of Independence Shares Corporation covering both Independence Trust Shares to be sold and those already issued to become effective as of June 14, 1938; and a registration statement of Independence Trust Shares Purchase Plans to be sold by Capital Savings Plan, Inc. to become effective as of June 8, 1938 (R. 370, 427, 428).

The Prospectuses issued under the registration statements of June 8, 1938, and June 14, 1938, contain a "contingent liability" footnote to the balance sheet of Independence Shares Corporation. This contingent liability footnote states that there may be a contingent liability on the part of Independence Shares Corporation for violations of Section 12 (1) of the Securities Act (R. 32).

The complainants asked for the appointment of a receiver for Independence Shares Corporation, successor to Capital Savings Plan, Inc. on the basis that Independence Shares Corporation was insolvent. This allegation was predicated on the contingent liability footnote to the balance sheet of Independence Trust Shares appearing in the prospectus dated January 3, 1939 (R. 32). The contingent liability footnote that appears in this prospectus is a "bring down" of the original footnote which appeared in the prospectus of Independence Trust Shares dated June 8, 1938, and was placed as a footnote to the balance sheet because of contingent liability arising from a possible violation of Section 12 (1) of the Securities Act which relates to the sale of securities without an effective registration statement.

On May 18, 1939 the motions of defendants to dismiss the complaint were denied (R. 454) and on May 27, 1939 the answer of Independence Shares Corporation and the individual defendants was filed, denying all allegations of fraud contained in the Bill and denying the allegation of insolvency (R. 72, 87).

On June 2, 1939 the District Court granted a preliminary injunction against The Pennsylvania Company for Insurances on Lives and Granting Annuities and Independence

Shares Corporation from paying and receiving, respectively, the sum of \$38,258.85 due from The Pennsylvania Company for Insurances on Lives and Granting Annuities to the Independence Shares Corporation (R. 460).

An appeal by the Independence Shares Corporation and individual defendants from the restraining order entered by the District Court was filed in the Circuit Court of Appeals for the Third Circuit (R. 462) and on November 11, 1939 an opinion was there filed, holding that the injunction entered by the District Court was entered in error and stated: "It follows that none of the prayers of the Bill of Complaint, asking for specific relief, may be granted . . . Accordingly, the orders appealed from are reversed and the cause remanded with directions to proceed in conformity with this opinion." (R. 475-480.)

On December 20, 1939 the Circuit Court refused the petition for re-hearing to the complainants (R. 496). Following this refusal the complainants filed a petition for a writ of certiorari to this Court and a copy of this petition and the record were served on Independence Shares Corporation and the individual defendants on March 1, 1940. It is in answer to this petition and brief that this present brief is filed.



**ARGUMENT.**

**Introduction.**

The complainants in their petition for certiorari have alleged five reasons for the allowance of the writ. These are as follows (Petition pp. 5, 6):

"1. The decision of the Circuit Court is in conflict with decisions of the Supreme Court and other Circuit Courts, as follows: (citing cases).

"2. The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that the Securities Act does not authorize an application for the appointment of a receiver, but restricts defrauded purchasers to a civil action at law for the recovery of a money judgment.

"3. The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that a defrauded purchaser of securities from an investment trust may not, in equity, rescind the contract induced by fraud, avoid the trust and recover the money paid thereunder.

"4. Respondents' appeal to the Circuit Court was premature in that the orders appealed from were interlocutory and not appealable, and the appeal should therefore have been dismissed.

"5. The opinion of the Circuit Court is inconsistent in that although first holding that the Securities Act Does Not authorize injunctive relief, it later indicates that the Securities Act Does authorize injunctive relief."

These will be considered in order below.



**I. The Decision of the Circuit Court Is Not in Conflict With the Decision of the Supreme Court or Other Circuit Courts,**

The complainants state that the decision of the Circuit Court, refusing their petition for the appointment of a receiver, is in conflict with decisions of the Supreme Court and other Circuit Courts. A determination of the status of the complainants and the character of their claims is necessary in considering whether the relief requested was properly refused by the Circuit Court.

The complaint alleges that the complainants are holders of Capital Savings Plan Contract Certificates and that these were sold to them by Capital Savings Plan, Inc. to which the Independence Shares Corporation is the successor (R. 8-10).

The complainants aver that there were material misrepresentations made to them in the sale of Capital Savings Plan Contract Certificates by the predecessor of the Independence Shares Corporation, and therefore, the defendant, Independence Shares Corporation, is liable to them as owners of Capital Savings Plan Contract Certificates under Section 12 of the Securities Act of 1933 (R. 17).

The complainants are not lien creditors or stockholders of defendants, but on the basis of the allegations contained in their bill, they are potential simple contract creditors of Independence Shares Corporation.

Before any of the complainants are entitled to the status of a creditor of Independence Shares Corporation, it is necessary for them to establish a claim under Section 12 of the Securities Act. It is necessary for them to show, as provided in Section 12 of the Securities Act, that the securities were sold to them "by means of a prospectus or

oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care would not have known, of such untruth or omission."

The law is well settled that a simple contract creditor, and a fortiori, a potential simple contract creditor, cannot evoke the aid of a court of equity until he has exercised his remedies at law, first of which is a recovery of a judgment at law and return of execution unsatisfied.

In *Pusey and Jones Company v. Hanssen*, 261 U. S. 491, 67 L. Ed., 763, 1922, this Court was considering an action brought by a citizen of Norway against Pusey and Jones Company. The plaintiff was a creditor holding promissory notes issued to him by the corporation and was also a stockholder. The requisite diversity of citizenship was present because of a statute giving a Norwegian the right to sue and the Court stated the question involved as follows (p. 495):

"Whether the Federal court, sitting in equity, has, by reason of the above statute, jurisdiction to appoint a receiver of an insolvent Delaware corporation upon application of an unsecured simple contract creditor, is the main question presented."

Mr. Justice Brandeis delivering the opinion of the court stated the law to be as follows (p. 497):

"A receiver is often appointed upon application of a judgment creditor who has exhausted his legal remedy. See *White v. Ewing*, 159 U. S. 36, 40 L. ed.

67, 15 Sup. Ct. Rep. 1018. But an unsecured simple contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true, whatever the nature of the property, and although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied, he may proceed in equity by a creditors' bill." (citing cases) . . . "Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right; nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights."

Mr. Justice Brandeis then went on and distinguished cases in which a petition for the appointment of a receiver by an unsecured creditor had been allowed where the defendant did not object and joined in the prayer. He stated that these cases were all distinguishable and no authority for granting the relief asked by the simple creditor where his petition for the appointment of a receiver was objected to by the defendant on the ground that the simple contract creditor was not a proper person to request the appointment of a receiver and the Court dismissed the creditor's petition for the appointment of a receiver.

This case was cited and approved in *Gordon v. Washington*, 295 U. S. 30, 79 L. Ed. 1282 (1934).

In *United States v. Sloan Shipyards Corporation*, 270 Fed. 613, the Court had before it the question as to whether

a simple contract creditor could obtain the appointment of a receiver in the Federal Court. Judge Neterer, speaking for the Court, stated (p. 617): "A federal court has no jurisdiction at the instance of a simple contract creditor whose claim has not been reduced to judgment to appoint a receiver for property on which he asserts no specific lien." (Citing cases.)

This Court, in *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, held that a simple contract creditor of a corporation whose claim has not been reduced to judgment, and who has no express lien upon its property, has no standing in a federal court of equity to obtain the seizure of the debtor's property through a receiver and its application to the payment of such debt. In this case, at page 379, the court says:

"It is the settled law of this court that such creditors cannot come into a court of equity to obtain a seizure of the property of their debtor, and its application to the satisfaction of their claims; and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal court cannot be obliterated by state legislation."

The complainants allege in their Bill of Complaint that they are defrauded purchasers and as such have a right to recover under the Securities and Exchange Act. An analysis of their status and their claim discloses that they are potential simple contract creditors entitled to a money decree and the Circuit Court so decided. The Court R. 478) in its opinion stated: "The defrauded person must seek to recover 'the consideration' paid by him. The relief given by the section is for a money judgment or for a



money decree payable to the individual who has been defrauded." And the Circuit Court, referring to the Securities Act, states: "Nor does Section 12 (a) enlarge the right of the appellees to the appointment of a receiver for the corporation upon the ground that it is insolvent or its assets are being dissipated. The law in this respect remains as it was. See *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, 497 and the authorities there cited." (R. 479.)

From the above it is apparent that the decision of the Circuit Court in the present case, that a receiver will not be appointed at the instance of the simple contract creditor, is in accord with the decisions of this Court and therefore the first reason assigned by the complainants for the allowance of the writ of certiorari is without merit.

**II. The Circuit Court Has Properly Decided the Question That the Securities Act Does Not Authorize Application for the Appointment of a Receiver at the Instance of a Defrauded Purchaser, But Restricts a Defrauder Purchaser to a Civil Action for the Recovery of a Money Judgment.**

The complainants give as their second reason why this Court should grant a writ of certiorari "The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit, that the Securities Act does not authorize an application for the appointment of a receiver, but restricts defrauded purchasers to a civil action at law for the recovery of a money judgment." It is submitted that the Circuit Court has properly decided this question and its opinion is not in conflict with the law as decided by this Court. See *Pusey & Jones Co. v. Hanssen*, 261 U. S. 491, 497 and authorities there cited.

The complainants have relied upon Section 22 (a) of the Securities Act of 1933 as giving the District Court the power to appoint a receiver for the defendants.

Section 22 (a) of the Securities Act of 1933 provides as follows:

"The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce **any liability or duty created by this title.** . . . ." (Emphasis ours.)

The Court's attention is called to the fact that both the Federal and State Courts are given jurisdiction of all suits in equity and at law to enforce "**any liability or duty created by this title.**"

It is necessary, therefore, to examine the Act to see what liabilities or duties are created thereby.

Sections 11 and 12 of the Act deal with the civil rights given to individual purchasers. Section 11 considers liabilities on account of false registration statement, of which there is no averment in this case. Section 12 deals with the civil liability arising in connection with prospectuses and communications, and this section alone must determine what rights or duties are given or imposed in Section 22 of the Act cited above.

Section 12 provides:

"Any person who—

(1) sells a security in violation of section 5, or



(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." (Emphasis ours.)

Although this section states that a suit may be brought at law or equity, such a suit may be brought only for the purpose of recovering the consideration paid. In other words, the right given, and the only right given under the Securities Act, is the right to recover a money judgment upon proof of certain facts as provided herein.

An annotation to Section 12 of the Securities Act found in Vol. 1 of Prentice-Hall, Securities Regulation Service, service par. 3151 states:

"The liability is placed upon the person who sells the security, in favor only of the person who purchases the security from him, provided such purchaser did

not know of the untruth or omission. This liability is not, however, absolute. The seller may escape liability if he sustains the burden of proof that he did not know of the untruth or omission, and in the exercise of reasonable care could not have known of it (see Par. 3156).

"If the purchaser tenders the security, he may recover from the seller the consideration paid for the security, with interest, less income received; if he no longer owns the security he may recover damages."

From this annotation it clearly appears that the only right which the purchaser of securities has under Section 12 is a right to a money judgment. Nowhere is it even remotely suggested that he could have a right to petition for the appointment of a receiver.

The complainants in a brief filed in the Court below took the position that since Section 22 (a) of the Securities Act gives the Court jurisdiction in law and equity, the complainants, by reason of this grant of jurisdiction, had a right to ask for the appointment of a receiver. What the complainants have failed to take into consideration is the qualifying provision which accompanies the grant of jurisdiction, and restricts the jurisdiction to actions "to enforce any liability or duty created by this title."

The right given to the complainants is to recover money damages only. No right to petition for a receiver is given, and consequently the complainants are in error when they assume that because they are given the right to sue in law or equity in the State and Federal Courts to recover a money judgment, that, therefore, by inference they are given the right to petition for the appointment of a receiver.

The inference which the complainants want the Court to draw is unjustified. An examination of the Securities Act will show that where it was intended to give the right to ask for injunctive relief, the Act makes specific provision.

In Section 20 of the Act, 15 U. S. C. A. 77t, such injunctive power is given to the Commission for the policing and the prosecution of offenses under the Act. No such power is given to an individual or individuals. They were amply protected by giving them a right to a money judgment.

In 23 Wash. U. L. Q. 251 there appears an article on "The Penal and Injunctive Provision of the Securities Act". On page 251 of the article the author states:

"The vital human problem present in the application of penal and injunctive laws necessitates the careful and clear draftsmanship of such enactments. Lawyers and interested parties should be afforded an adequate comprehension of the rights and duties imposed by the legislation. It is the purpose of this note to present the general penal and injunctive provisions of the Securities Act of 1933, and to point out the significant factors which have influenced, or which may influence, the courts in interpreting these provisions.

"The Securities & Exchange Commission is given authority to obtain injunctive relief against anyone 'who is engaged or is about to engage in any acts or practices which will constitute a violation of the Act or any rule or regulation.'"

The article discusses the relief, states that the power to request its exercise is limited to the Commission, and concludes on pages 261 and 262 as follows:

"Thus viewed, the penal and injunctive provisions of this complicated Act are for the most part clear

and unambiguous. The decisions interpreting these sections have added little difficulty. The future, of course, will bring new problems and unexpected complications. It is believed, however, that if the purposes of these carefully drafted penal and injunctive provisions are borne in mind, the subtle, exculpatory distinctions are not permitted to develop, these vital problems under the Act will remain relatively simple."

Complainants seek injunctive relief, the above cited authorities show that the Act does not authorize such relief and they are not entitled thereto.

An examination of a number of law review articles dealing with the question of the civil liability of a seller of securities discloses that the writers are of the opinion that the only right that the complainants have are rights set forth in Section 11 and 12 of the Act, and that they are there given a right to a money judgment and to a money judgment alone. *Securities Act of 1933*; L. K. James, Prof. of Law, University of Michigan Law School, 32 Mich. Review 624; *Administrative Interpretation of the Securities Act of 1933*, 45 Yale Law Journal 1076.

In 43 Yale Law Journal 227 there appears an article written by Harry Shulman, Associate Professor of Law, Yale University, entitled "Civil Liability and the Securities Act". On page 243 of this article the author in speaking of the civil liability imposed by Sections 11 and 12 of the Act states: "Neither part of the sections puts the seller under a novel, indeterminate or harsh risk."

It is submitted that the appointment of a receiver based upon the authority of the Securities Act would indeed place upon the seller a novel, indeterminate and harsh risk.

The Judge in the District Court grounds jurisdiction to grant the relief sought on Section 16 of the Securities Act. (Record p. 433.)



Section 16 of the Act, 15 U. S. C. A. Sec. 77p as follows:

"The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."

In an annotation found in Vol. 1 of Securities Regulation Service, Prentice-Hall, Inc. service Par. 3148, dealing with the effect of Section 16 of the Act, it is stated, "There is nothing in the Act, therefore, to prevent an injured person from pursuing the other remedies recognized by the common law or the statutory law of the appropriate state."

This section of the Act does nothing more than to preserve to the purchaser his "other rights and remedies".

The Circuit Court in speaking of this stated:—

"Section 16 of the Act, 48 Stat. 84 (15 U. S. C. A. 77p) providing that 'The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity', does not relate to venue as indicated by the court below or enlarge the remedy given by Section 12 (2). Congress by the language employed sought only to make it abundantly clear that it was not preempting this field to the federal jurisdiction, thereby prohibiting recovery to defrauded individuals under the law of the states as that existed prior to the passage of the Securities Act." (R. 478.)

The Circuit Court has properly decided that a defrauded purchaser of securities under the Securities Act is entitled only to a money judgment. This Court has decided that a simple contract creditor is not entitled to the appointment of a receiver to enforce his claim until such time as he has reduced his claim to judgment. In the present case none of the complainants have reduced their claims

to judgment and in fact none of them even appeared or testified in the proceeding (R. Index).

**III. The Circuit Court Did Not Decide "That a Defrauded Purchaser of Securities From an Investment Trust May Not, in Equity, Rescind the Contract Induced by Fraud, Avoid the Trust and Recover the Money Paid Thereunder."**

The complainants set forth as the third reason for the allowance of a writ of certiorari that "The Circuit Court has decided an important question of Federal law which has not been, but should be, settled by this Court, to wit; that a defrauded purchaser of securities from an investment trust may not, in equity, rescind the contract induced by fraud, avoid the trust and recover the money paid thereunder."

A reference to the opinion shows that this statement as to what the Circuit Court decided is erroneous.

The Court on the contrary decided:

"Section 12 (2) of the Securities Act therefore provides a right to sue in a District Court of the United States for one who has purchased securities upon an untrue statement of a material fact made by the use of any means of transportation or communication in interstate commerce and that such a suit may be maintained by the aggrieved person in an action at law or by a bill in equity depending upon whether the cause of action is cognizable at law or in equity. At the present time, the remedy of the aggrieved person lies in the 'civil action' prescribed by Rule 2 of the Federal Rules of Civil Procedure. The nature of the suit, however, remains as specified by Section 12 (2). The defrauded person must seek to recover 'the consideration' paid by him. The relief given by the section is



for a money judgment or for a money decree payable to the individual who has been defrauded." (R. 478.)

This clearly shows that the Circuit Court held that a defrauded purchaser could rescind and obtain the money paid under his contract.

#### **IV. Respondents' Appeal to the Circuit Court Was Not Premature and the Circuit Court Properly Entertained the Appeal.**

The fourth reason assigned by the complainants for the allowance of a writ of certiorari is: "Respondents' appeal to the Circuit Court was premature in that the orders appealed from were interlocutory and not appealable, and the appeal should therefore have been dismissed."

The Judge of the District Court entered an interlocutory injunction enjoining The Pennsylvania Company for Insurances on Lives and Granting Annuities from paying and Independence Shares Corporation from receiving the sum of approximately Thirty-eight Thousand Dollars due from The Pennsylvania Company to the Independence Shares Corporation. (R. 460.)

This order was the basis of the appeal of the Independence Shares Corporation to the Circuit Court (R. 462, 464).

The Judicial Code Sec. 129 Amended, Acts of Congress, March 3, 1891, c. 517, Sec. 7, 26 Stat. 828 as amended, and 28 U. S. C. A. Sec. 227 provides:

**"Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory**

order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, **an appeal may be taken from such interlocutory order or decree to the circuit court of appeals.**" (Emphasis ours.)

In *Richmond v. Atwood* (Mass. 1892) 5 U. S. App. 151; 2 C. C. A. 596, 52 F 10; the Court in speaking of the statute held that the statute was intended to extend the right of appeal to all classes of interlocutory decrees (of injunctions) which interfere with the possession of property or operate in restraint of trade.

The injunction entered here interferes with the defendant's right of possession of a substantial amount of its property, and the effect of the injunction is naturally harmful to the defendant, Independence Shares Corporation, a dealer in securities.

In *Lake National Bank v. Wolfborough Savings Bank* (N. H. 1897) 78 F 517, 24 C. C. A. 195, the Circuit Court held that an appeal was proper from an interlocutory decree granting an injunction although the appeal raised only the question of the lower Court's jurisdiction.

In *Metropolitan Water Co. v. Kaw Val. Drainage District* (Kansas, 1912) 223 U. S. 519, 56 Law Ed. 533, this Court held that in an appeal to the Circuit Court of Appeals from an interlocutory order, the Court could direct the bill to be dismissed if it appeared to it that the complainant was not entitled to maintain his suit.

In view of the plain language of Section 7 of the Act of 1891 and the cases under the Act, it is apparent that the Circuit Court had jurisdiction to hear this appeal and determine whether or not the District Court has jurisdiction.

tion to entertain the suit of the complainants for the appointment of a receiver.

It is apparent that respondents' appeal to the Circuit Court was not premature and the Circuit Court properly entertain the appeal.

#### V. The Opinion of the Circuit Court Is Not Inconsistent.

The fifth reason assigned by the complainants for the allowance of their writ of certiorari is: "The opinion of the Circuit Court is inconsistent in that although first holding that the Securities Act DOES NOT authorize injunctive relief, it later indicates that the Securities Act DOES authorize injunctive relief."

The Court's attention is directed to the opinion of the Circuit Court wherein it stated:

"The question of whether the appellees upon a proper showing might not obtain injunctive relief against Independence Shares Corporation in aid of the remedy supplied to them by Section 12 (2) of the Act, is not before us and *therefore we do not pass upon it.*" (R. 480.) (Emphasis ours.)

This is the basis for the complainants' statement that the Circuit Court decided that they are entitled to injunctive relief under the Act.

It is apparent that the appellant has misconstrued what the Circuit Court decided, since the opinion stated "we do not pass upon it,"; therefore there is no inconsistency.

#### CONCLUSION.

It is submitted that the complainants have failed to establish any reason for granting the writ of certiorari. The Circuit Court has not left the complainants without a

remedy as under its decision the complainants may establish their right, if any, to recover the consideration paid by them for their securities.

The Securities Act does not give the purchaser of securities the right to enforce payment of an alleged claim against a seller by requesting the appointment of a receiver for the seller. If it did, the seller of securities could not afford to contest the claim of any purchaser no matter what justification it had for refusing to pay it.

It is therefore respectfully submitted that the Court should dismiss the petition for writ of certiorari.

FRANK ROGERS DONAHUE.